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90-621

Supreme Court, U.S.
FILED
OCT 15 1990
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM 1990

RONALD D. CASTILLE, District Attorney
of Philadelphia County;
JOSEPH M. RYAN, Superintendent,
State Correctional Institute at Dallas;
and ERNEST D. PREATE, Jr.,
Attorney General of Pennsylvania,
Petitioners

V.

WILLIAM HOWARD HARRISON,
Respondent

APPENDICES TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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APPENDIX "A"

FILED: JULY 25, 1990

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 90-1175 and 90-1220

HARRISON, WILLIAM HOWARD

vs.

RYAN, JOSEPH M., SUPT., S.C.I.
DALLAS, PA. AND
THE ATTORNEY GENERAL OF THE STATE
OF PENNSYLVANIA

Joseph M. Ryan, The Attorney General
of the State of Pennsylvania and
Ronald D. Castille,

Appellants in No. 90-1175

HARRISON, WILLIAM HOWARD

Appellant in No. 90-1220

vs.

RYAN, JOSEPH M., SUPT., S.C.I.
DALLAS, PA. AND
THE ATTORNEY GENERAL OF THE STATE
OF PENNSYLVANIA

Appeal from the United States
District Court for the
Eastern District of Pennsylvania
(D.C. Civil No. 87-07439)
Argued
June 27, 1990

Before: SLOVITER and
MANSMANN, Circuit Judges,
and THOMPSON, District Judge.*

(Filed July 25, 1990)

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---

* Honorable Anne E. Thompson of the United States District Court for the District of New Jersey, sitting by designation.

OPINION OF THE COURT

MANSMANN, Circuit Judge.

In this appeal from the grant of a writ of habeas corpus, the Commonwealth of Pennsylvania contends that the petitioner, William Howard Harrison, is not entitled to habeas relief under Batson v. Kentucky, 476 U.S. 79 (1986), which prohibits the prosecution's use of peremptory challenges to exclude individuals from serving as jurors on the basis of race. Because Harrison's appeal from the judgment of sentence was on direct review in the state court system at the time of the Batson decision, and because the prosecution was unable to articulate a racially neutral reason for its peremptory challenge of a black jury venireperson, we will affirm the decision of the district court. Harrison's cross-appeal is mooted

by our decision in his favor in the government's appeal.[1]

I.

In September, 1982, the petitioner, William Howard Harrison, was tried and convicted of robbery and conspiracy. During the jury selection process, the prosecutor used six of his eight peremptory challenges to dismiss jury venirepersons from the jury panel. All six were black; Harrison is black. Harrison's trial counsel timely objected

---

[1]Harrison alleged in his cross-appeal that the magistrate's determination that the prosecutor had not discriminated by using his peremptory challenges against two other veniremen was clearly erroneous. In light of our holding which mandates a new trial, we need not address this contention. We note, however, that the determination of whether the prosecutor's reason was racially neutral is a factual determination and therefore entitled to great deference. Batson, 476 U.S. at 98, n.21. Harrison did not offer evidence to show that the determination as to the two veniremen was clearly erroneous.

to the prosecutor's use of peremptory challenges to exclude all black venirepersons.

In April, 1986, the Supreme Court decided Batson v. Kentucky, 476 U.S. 79 (1986), and held that the equal protection clause is violated when venirepersons are excluded from the jury on the basis of race. At that time, Harrison's direct appeal from his conviction was pending before the Pennsylvania Superior Court, which affirmed his conviction in May of 1986. The Pennsylvania Supreme Court denied allocatur in December, 1986.

On November 19, 1987, Harrison filed a petition for writ of habeas corpus, challenging his conviction and incarceration. He alleged that the prosecutor had impermissibly used race as a factor, when using his peremptory challenges, in order to exclude Blacks from the jury. The United States Magistrate

held a hearing in October of 1988, to determine whether the prosecutor could provide clear, specific and racially neutral explanations for his peremptory challenges. The magistrate issued a Report and Recommendation concluding that the prosecutor was able to articulate racially neutral explanations for the dismissal of five of the six venirepersons, but was unable to explain the dismissal of the sixth.[2] Consequently, the magistrate recommended that the certificate of probable cause be issued and the writ granted.

---

[2]The magistrate did recognize that the race-neutral reasons articulated by the prosecutor with respect to several black jurors were not strong: (1) Juror Logue had a "liberal arts" education; (2) Juror Nottingham was tentative in her responses; and (3) Juror Toney sat next to and was talking to Juror Edwards who had previously been struck.

The district court adopted the Report and Recommendation of the magistrate and granted the writ. The district court then ordered that the Commonwealth either retry the petitioner within 90 days or release him. The Commonwealth appealed from the grant of the writ.

Because Harrison's appeal from his conviction was on direct review in the Pennsylvania state court system at the time of the Supreme Court's decision in Batson, we must apply the new rule. Griffith v. Kentucky, 479 U.S. 315 (1987) (new rule for the conduct of criminal prosecutions is to be applied to all cases, state or federal, pending on direct review or not yet final). The district court's factual determinations, including issues of credibility, are entitled to great deference and are not to be overturned unless clearly erroneous. Batson v. Kentucky, 476 U.S. 79 (1986). As to

matters concerning questions of law, however, we have plenary review.

II.

In Batson v. Kentucky, 476 U.S. 79 (1986), the Supreme Court reaffirmed a principle decided over one hundred years earlier that "the State denies a black defendant equal protection of the laws when it puts him on trial before a jury from which members of his race have been purposefully excluded." 476 U.S. at 85, citing Strauder v. West Virginia, 100 U.S. 303 (1880). Moreover, the Court noted, racial discrimination in the selection of jurors not only harms the defendant but also harms the excluded juror and brings into question the fairness of the judicial system. Id. at 87.

To avoid the crippling burden of proof which has been placed on the defendant by some courts to establish the existence of a violation of the equal

protection clause, the Court discerned the elements of a prima facie case from the many cases applying Strauder. 476 U.S. at 92-94. Thus, to establish a case of purposeful discrimination, the defendant must show that

> he is a member of a cognizable racial group, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate'. Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race. This combination of factors in the empaneling of the petit jury, as in the selection of the venire, raises the inference of purposeful discrimination.

Batson, 476 U.S. at 96. Once the defendant establishes the prima facie showing, the State has the burden of articulating a racially neutral reason for challenging

the black venirepersons. While the prosecutor's explanation need not rise to the level necessary to justify a challenge for cause, a mere affirmation of good faith is insufficient. Id. at 97.

In the case before us, Harrison established that he was a member of a cognizable race, i.e., he is black, and that the prosecutor used six of his eight peremptory challenges to eliminate six black venirepersons from the jury. In order to determine if other factors or circumstances could have resulted in the dismissal of the black venirepersons, an evidentiary hearing was necessary.

The magistrate thus conducted a hearing at which the prosecutor reconstructed the jury selection through the use of his notes. Based upon the examination of the prosecutor and the transcript of the jury voir dire, the magistrate concluded that of the six black jurors

excluded by peremptory challenge, only one challenge was unexplained. The prosecutor believed it may have been due to her age (70 at the time) but was not certain. The transcript of the evidentiary hearing reveals the following colloquy:

> Q. Now, the notation O.K. would mean what to you at this time?
>
> A. That means she was okay. I was going to take her as a juror, that I was going to accept her.
>
> Q. But you did not, obviously.
>
> A. Correct.
>
> Q. And what if you can, tell us what would be the reason that you would strike her?
>
> A. I don't know.
>
> Q. You don't have a present recollection, is that correct?
>
> A. That's right.
>
> * * *
>
> A. Just looking at these notes, I don't know. I don't have her age down here. The fact that her son is a retired police officer, I assume she is an older woman. That could have been a factor; I don't know.

Appendix at 198. Due to this lack of certainty, the magistrate found that the Commonwealth failed to rebut Harrison's prima facie showing of racial discrimination as to the one juror. Indeed, the magistrate stated:

> The reason why I must reject this explanation is not because of age but because the prosecutor could not recall his reason. The testimony which I credit is summarized by his repeated statement "I don't know." Since this is not a satisfactory explanation under Batson, I conclude the evidence is not acceptable and the Commonwealth has failed to meet the standard.

Appendix at 263. We agree with the magistrate, and with the district court which approved the magistrate's Report and Recommendation, that the prosecutor's failure to recall his reason for using a peremptory challenge to strike the juror was insufficient to satisfy the Batson requirement that the "prosecutor ... must articulate a neutral explanation related to the particular case to be tried." 476

U.S. at 98. It is certainly not suprising that the prosecutor could not recall his reason given the length of time which passed between jury selection and the Batson hearing. Indeed, the difficulty of the prosecution to recall reasons for peremptory challenges was the reason the Supreme Court decided not to apply Batson to cases on collateral review. See Allen v. Hardy, 478 U.S. 255 (1986). Certain other factors, however, most notably the interests of justice, require retroactive application of Batson for cases on direct review even where a long period of time occurs in the state court appellate process. This is especially true here where defense counsel timely objected to the use of peremptory challenges, the number of peremptory challenges exercised against Blacks was so great, the race neutral reasons given for striking other black jury venirepersons were so weak, and

the prosecutor was unable to articulate a race neutral reason for striking one of the black venirepersons.

Having determined that the Commonwealth has failed to meet its burden, i.e., that the "prosecutor must give a 'clear and reasonably specific' explanation of his 'legitimate reasons' for exercising the challenges," Batson, 476 U.S. at 98, n.20, (citing Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 258 (1981)), we are now faced with the question of whether the exclusion of one black juror from the jury on the basis of race is sufficient to require a new trial pursuant to Batson. We hold that it is.

The Court in Batson was necessarily concerned about the effect of racial discrimination within the judicial system where it "is most pernicious because it is a 'stimulant to that race

prejudice which is an impediment to securing to black citizens that equal justice which the law aims to secure to all others.'" 476 U.S. at 88, citing Strauder v. West Virginia, 100 U.S. at 308. Moreover, the Court noted that

> [j]ust as the Equal Protection Clause forbids the States to exclude black persons from the venire on the assumption that blacks as a group are unqualified to serve as ... jurors, so it forbids the States to strike black veniremen on the assumption that they will be biased in a particular case simply because the defendant is black. The core guarantee of equal protection, ensuring citizens that their State will not discriminate on account of race, would be meaningless were we to approve the exclusion of jurors on the basis of such assumptions, which arise solely from the jurors' race.

Batson, 476 U.S. at 97-98. While the Court recognized the administrative burdens the prosecution and trial courts would face in following the Batson mandate, the Court also recognized that "[b]y requiring trial courts to be sensitive to the racially discriminatory use of

peremptory challenges, our decision enforces the mandate of equal protection and furthers the ends of justice." Id. at 99. This holds true when even one black person is excluded for racially-motivated reasons.

Our holding is supported by decisions of two of our sister courts of appeals. In United States v. David, 803 F.2d 1567 (11th Cir. 1986), the Court of Appeals for the Eleventh Circuit stated: "the striking of one black juror for a racial reason violates the Equal Protection Clause, even where other black jurors are seated, and even when valid reasons for the striking of some black jurors are shown." 803 F.2d at 1571. The court reasoned that the rationale of Batson was premised on the notion that black venirepersons are entitled not to be struck for racially motivated reasons and black defendants have the right to be

tried in a judicial system which does not exclude on the basis of race. Id. The Court of Appeals for the Eighth Circuit held similarly in United States v. Battle, 836 F.2d 1084 (8th Cir. 1987).

III.

Since we believe that the Batson Court placed the requirements of justice and equal protection above the burden placed on the Commonwealth to retry the defendant before a jury from which no one has been excluded for a racially motivated reason, we conclude that the prosecution's failure to rebut Harrison's prima facie showing of racial discrimination as to one juror dictates the grant of a new trial. We recognize the burden placed on the Commonwealth to retry Harrison after almost nine years have passed. Nevertheless, the intent of the Supreme Court in deciding Batson was to guarantee, both to the defendant desiring a jury trial and to

the jury venirepersons, that the jury will be selected on a racially non-discriminatory basis. Consequently, we will affirm the order of the district court granting the petitioner's writ of habeas corpus and requiring the Commonwealth to either retry the petitioner within 90 days or release him.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

WILLIAM HOWARD HARRISON, Petitioner	:	CIVIL ACTION
v.	:	
JOSEPH M. RYAN, SUPT., S.C.I. DALLAS, PA, Respondent	:	NO. 87-7439
and	:	
THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA, Additional Respondent	:	

MEMORANDUM ORDER

AND NOW, TO WIT, this 26th day of January, 1990, in consideration of the pleadings and record herein, and after review of the Report and Recommendation of Tullio Gene Leomporra, Chief United States Magistrate, and the objections filed thereto, it is hereby ORDERED that:

1. The Report and Recommendation is approved and adopted.

2. The petitioner's Petition for Habeas Corpus is granted.

3. The petitioner shall be retried within ninety (90) days from the date of this Order.

4. If the Commonwealth fails to retry petitioner as ordered, petitioner shall be released.

Having reviewed the record before it, the court adopts the findings of fact as stated in the Report and Recommendation. As explained in the Report and Recommendation, in order for a petitioner to successfully contest a prosecutor's use of peremptory challenges as violating the Equal Protection Clause of the Constitution, the petitioner must establish a prima face case of purposeful discrimination as required by the United States Supreme Court in Batson v. Kentucky, 106 S.Ct. 1712, 1723 (1986). Based on the evidence provided in the record, the court is satisfied that petitioner has met this burden. Specifically, the

petitioner made a showing that he is black and that all six of the venirepersons the prosecutor peremptorily challenged were black. The record also indicates that the jury consisted of eleven white persons and one dark-skinned Indian. Having made that showing, the burden then shifted to the Commonwealth to come forward with a neutral explanation for challenging black jurors. Batson, 106 S.Ct. at 1723. Because the court agrees with the United States Magistrate that the Commonwealth failed to articulate a neutral reason for challenging one of the six jurors, the habeas corpus petition must be granted.

Although the court adopts the Report and Recommendation, the court has a few remaining concerns. The court recognizes the burden this ruling places on the Commonwealth. As stated in the Respondent's Objections to the Report and Recommendation of the United States

Magistrate, if the Commonwealth chooses to retry the petitioner, the Commonwealth must essentially reconstruct its case from the beginning, including piecing together evidence, locating witnesses, and preparing for trial. However, the disadvantage that may be placed on the Commonwealth cannot be remedied by offending the sound constitutional principles expressed by the United States Supreme Court in Batson v. Kentucky.

In addition, if the Commonwealth has a concern that the ninety (90) day period in which it must retry petitioner is overly burdensome, it may file a motion with the court giving specific reasons why this period should be extended. Should the Commonwealth do so, the court will give the matter due consideration and provide relief where appropriate.

It is so ordered.

LOUIS C. BECHTLE, J.

APPENDIX "C"

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

WILLIAM HOWARD HARRISON, Petitioner	:	CIVIL ACTION
vs.	:	
JOSEPH M. RYAN, SUPT., S.C.I. DALLAS, PA, Respondent	:	NO. 87-7439
AND	:	
THE ATTORNEY GENERAL OF THE STATE OF PENNSYLVANIA, Additional Respondent	:	

REPORT AND RECOMMENDATION

TULLIO GENE LEOMPORRA
CHIEF UNITED STATES MAGISTRATE

PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW & DISCUSSION

On November 19, 1987, petitioner, William Howard Harrison, filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. This petition asserted that during his jury trial in the Philadelphia County Court of Common Pleas on September 20, 1982, in which he was

convicted of one (1) count of robbery and criminal conspiracy, petitioner:

1. was denied due process when the trial court refused to allow him to proceed as pro se counsel; and

2. was denied equal protection and a fair trial by the prosecutor's use of peremptory challenges at trial.

On August 3, 1988, I recommended that the petitioner's claim regarding waiver of counsel be denied being without merit. As to the petitioner's second contention, an evidentiary hearing was ordered to determine whether the state used its peremptory challenges in a race-neutral way as defined in Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712 (1986). A more complete history of the preliminary facts is contained in my prior Report and Recommendation which is attached to this Report and Recommendation and which was approved by the Honorable Louis C. Bechtle.

The discussion which follows consists of my Proposed Recommended Findings of Fact and Conclusions of Law.

In the trial of this matter, the jury determined that on February 5, 1982, the petitioner, William Howard Harrison, was a conspirator with two (2) other defendants, his brother, James Harrison and his nephew, Donald Harrison, in a robbery of the First Pennsylvania Bank at 1845 Walnut Street in Philadelphia. The defense to the alleged crime was that the petitioner was a passive witness to the bank robbery, not an active participant (Trial Tr. 20). The prosecution's evidence against petitioner was presented by a Detective Robert Kuhlmeir [sic] of the Philadelphia Police Department, who testified concerning statements given to him by both the petitioner and Donald Harrison (Trial Tr. 534-591). The substance of petitioner's statement was that

the Harrison brother who actually robbed the bank had told the petitioner his plans to rob the bank (Trial Tr. 549), and petitioner waited in the car while his brother James was robbing the bank (Tr. 545). The substance of Donald Harrison's statement was that he went into the bank with James, thinking James was going to cash a check (Trial Tr. 557-558), and that it was petitioner's and James' idea to rob the bank (Trial Tr. 561) (see pages 3, 4 and 5 of this report).

The state presented as its witnesses the bank teller (Trial Tr. 428) (who was not able to present any evidence against petitioner), Policemen Fred Short (Trial Tr. 452) and Charles Assman (Trial Tr. 465), Detectives Michael John Duffy (Trial Tr. 470), Richard Bova (Trial Tr. 485), Joseph Falcone (Trial Tr. 522), and Robert Kuhlmeier (Trial Tr. 533), and James Harrison (Trial Tr. 496) (who had

earlier pled guilty to robbery and conspiracy).

The bank teller testified that at 4:45 p.m. on Friday, February 5, 1982, she was working at the teller's window closest to the door of the bank when she saw two (2) men come through the door (Trial Tr. 431-432). One of the men, who she was unable to identify, waited at the brochure rack while the other man (she later identified as James Harrison) came to the window and presented a note which stated "Give me all your money, I have a gun" (Trial Tr. 433). The bank teller did not say she actually saw a gun and there was no testimony that a gun was used in the robbery. The bank teller gave James Harrison all the bills in her top drawer as well as bait money which eventually explodes leaving a red dye on the money (Trial Tr. 433).

James Harrison admitted to robbing the bank, and stated on direct examination that he went into the bank with his nephew, Donald Harrison, and when he left the bank he got into a car in which the petitioner was a passenger (Trial Tr. 496-504). Although James Harrison pled guilty to robbery and conspiracy, he asserted on direct examination that neither his nephew, Donald Harrison, nor his brother, the petitioner, knew of his plan to rob the bank (Trial Tr. 521). Apparently the jury chose not to believe the witness.

On February 6, 1982, at 4:45 a.m., the petitioner alerted Policeman Fred Short that he knew who committed the robbery of the first [sic] Pennsylvania Bank and gave Officer Short some money with red dye on it (Trial Tr. 453-455). The petitioner told Officer Short that one of the males involved in the robbery was

his brother, James, who was waiting for police outside a hotel on 19th and Arch Streets (Trial Tr. 457). James was arrested and $100.00 of the red stained money was retrieved from his wallet by police (Trial Tr. 467-488). Later that same morning, the petitioner gave the following statement to Detective Michael John Duffy:

> "On February 5, 1982, at approximately 5:00 p.m., the witness stated that 'X' and 'Y' came into the apartment, 1301 North 15th Street, second floor rear, and 'Y' was carrying a brown briefcase. 'Y' dumped all this money with the red dye on the floor. He started giving the money, splitting it up between him and 'X'. 'X' gave me one hundred fifty dollars which he owed me.
>
> I know where the money came from because of the red dye and because 'Y' told me that he made a big score.
>
> I called 'X' to the side and said let's go for a walk. We went to the Apollo Hotel, 19th and Arch Streets.

> We got a room and that's when I started talking to him about giving himself up. At this time, 'X' told me that he gave the lady a note at the bank. She gave him a stack of money and he ran out of the bank and the money blew up.
>
> 'X' decided to give himself up and I went to the phone and called the cops. The officer came and picked me up. We road [sic] around the block and I told him 'X' wanted to give himself up.
>
> We drove to the hotel and picked up 'X' outside."

Following James Harrison's arrest on February 6, 1982, the police had continued conversation with the petitioner (Trial Tr. 536-538). Up until February 19, 1982, the petitioner was not a defendant in the case, but only a witness (Trial Tr. 538). On February 19, 1982, petitioner was arrested by Detective Kuhlmeier after giving the following statement, which the Detective read at trial (Trial Tr. 543-551):

"It was Wednesday, 2-3-82. We were sitting up at the house, 'X', 'Y' and me. I cleaned windows at 1717 Spring Garden Street, the Architect Building and they paid me sixty dollars in a check. I was in debt to some people on 15th and Stiles Street.

On Friday 'X' came back and he showed me this check with his name on it. 'Y' had given it to him. It was one of the checks that you have and I think it was for fifty or twenty-five dollars. 'X' came back and pulled me into the bathroom and told me that 'Y' had set him up with the people he sold a ticket to and that they were looking for him to put a hit on him.

He wanted to leave town but he said that he had a way to get the money and square himself. That's when he told me he was going to do the bank but he didn't want me to go in with him and he was going to take 'Y'. He said that 'Z' would take us down in his car and he was high from drinking wine so he wouldn't know what was going on.

We all went down in 'Z's station wagon and he parked on Sansom Street. I think at 20th.

Me and 'Z' stayed in the car and 'X' and 'Y' went around the corner for about ten minutes. They came running back

carrying a brown briefcase with money in it with red stuff on the money. It stunk and 'Y' took the money from who was -- it stunk and 'Y' took the money from who was in the front seat next to 'Z' who was playing with it.

'Z' said what have you got me into? 'X' told him, 'Let's get out of here, I got your money.'

'Y' had the money and the tear gas was hurting our eyes on the way back to the house. When we got back to my house 'Y' jumped out because he had the key. He ran into the door with the money and left us outside.

The kids threw us the keys and we went in. 'Y' had hid the money under the couch and pulled the curtain between the rooms so my mother wouldn't know what was going on. Then 'Y' started counting the money out. It was 'Z', 'X' and 'Y'.

THE COURT: I think there is something left out there.

It was me, 'Z' and 'Y'.

THE WITNESS: Yes, that's right. It was me, et cetera, et cetera.

He said here you go and gave us each some of the money. I got one hundred fifty dollars.

'Z' got three hundred dollars and 'Y' and a girl split the rest up. The real bad stuff (money) was put in a bag and was supposed to have been thrown away.

After it happened, I thought about it and looked at the money. It had the stuff on it. It wasn't real bad but I was thinking about it. We all threw in some money to a pot and went and got high together. That was after 'Z' had gone and after we got high I told 'X', 'Let's go, I want to talk to you.'

Then we went down to the Apollo Hotel, 19th and Arch and rented a room.

I said, 'Look, man, we had better give up because with the money being red and all, the cops are going to catch us anyway.'

Excuse me. I said, 'Look, man, we had better give up because with the money being red and all the cops are going to catch us.'

Anyway, 'X' had put those -- anyway, 'Y' had put those people on 'X' and they would get me if they couldn't get him so I told him let's call the cops. He didn't want to do it. He wanted to go back to the house

and jack 'Y' up because he had more money.

I said, 'You know, 'Y' is loud and he would start screaming and put it on Momma and we would have to kill him.' We didn't want to do that so 'X' said I was right.

I told him to stay there and I went out to get the cops. I went and called the police and they came. The detective came and I went up to him and told him about what had happened and that 'X' wanted to give himself up.

We moved away from the hotel and we came back around and 'X' was standing on the corner and I called him over to the car. The detective said, 'Do you want to give yourself up?' And he said, 'Yes", and they took him. I had given the money I had to the detective --

THE COURT: 'Took him.'

THE WITNESS: They took him. I had given the money I had to the detective what I had left and they took what 'X' had left, too. They took us in here and they got a statement from both of us and then they let me go. But they said to stay available.

Question. Whose idea was it to rob the bank?

Answer. It was 'X's idea and he got everybody else in on it. 'X' didn't know what was going to happen but he got a share of the money at the house.

Question. You knew about the robbery, didn't you?

Answer. Yes, I knew about it. He told me in the bathroom.

The defense chose to present no evidence in its case-in-chief.

Petitioner was convicted in the Philadelphia County Court of Common Pleas, after a jury trial on September 20, 1982, of one (1) count each of robbery and criminal conspiracy, the Honorable Louis G. Hill, presiding. Commonwealth of Pennsylvania v. William Howard Harrison, Nos. 207 and 210, April Term 1982. Post-verdict motions were denied and petitioner was sentenced to not less than ten (10) nor more than twenty (20) years for the robbery conviction, and to not less than five (5) nor more than ten (10) years imprisonment for criminal

conspiracy, to run concurrent to the robbery sentence. Petitioner filed an appeal in the Superior Court of Pennsylvania where the judgment of sentence was affirmed on May 16, 1986. Commonwealth v. Harrison, 556 Pa. Super. 616, ____ A.2d ____ (1986). Petitioner then raised his points for appeal in a Petition for Allowance of Appeal to the Supreme Court of Pennsylvania which denied allocatur on December 29, 1986. Commonwealth v. Harrison, No. 548 E.D. Allocatur Docket 1986.

During the period of time the petitioner's appeals were working in the state system, he filed two federal habeas corpus petitions, April 30, 1984 and February 24, 1987, which were denied and dismissed without prejudice for failure to exhaust state remedies. On November 19, 1987, petitioner filed the instant petition.

This case presents an unusual and interesting procedural scenario. Batson v. Kentucky, supra, was not decided until four (4) years after the petitioner's conviction, and not having had Batson as a guidepost in 1982, the presiding judge at petitioner's trial, the Honorable Louis G. Hill, did not inquire into the motives of the prosecutor in utilizing six (6) of eight (8) available peremptory challenges to strike six (6) blacks from the venire panel (the prosecutor used only six (6) challenges). The petitioner is black.

Batson is to be applied retroactively to cases pending on direct review or those not yet final at the time Batson was decided. Griffith v. Kentucky, 479 U.S. 314, 107 S.Ct. 708 (1987). Batson, however, is not to be applied retroactively to a case on federal habeas corpus review. Allen v. Hardy, 478 U.S. 255, 106

S.Ct. 2878, 92 L.Ed. 199 (1986). The petitioner's case was not final at the time Batson was decided on April 30, 1986, because the Pennsylvania Supreme Court did not deny allocatur to the petitioner until December 29, 1986. Therefore, although this is a habeas corpus petition, Batson should be applied retroactively. See also Teague vs. Lane, Director, Illinois Department of Corrections, et al., No. 87-5292, U.S. Supreme Court, decided February 22, 1989.

In deciding that the Batson rule, although a "clear break" from past precedent, should be applied retroactively, the court stated, "the fact that the new rule may constitute a clear break with the past has no bearing on the 'actual inequity that results' when only one of many similarly situated defendants receives the benefit of the new rule." Id. at 479 U.S. 328, citing United States v.

Johnson, 457 U.S. at 556 n.16. The defendants Batson, Griffith and petitioner were all tried and convicted at about the same time period. Of note in the Griffith opinion was that it left open the question of whether retroactivity should apply to cases on habeas corpus petitions. Id., Justice Powell concurring, p.329. Justice White, in his dissent in Griffith asked why the court would allow a new criminal procedure rule to be retroactive on cases still on direct review but not on collateral review. Id. at 329 citing Allen v. Hardy, supra. "[I]t seems to me that the attempt to distinguish between direct and collateral challenges for purposes of retroactivity is misguided. Under the majority's rule, otherwise identically situated defendants may be subject to a different constitutional rule, depending on just how long ago now-unconstitutional conduct occurred and how quickly cases

proceed through the criminal justice system." Id. at 331.

The rule of Allen v. Hardy, supra, although still viable, applies only to collateral review of convictions that became final before the Batson opinion was announced. The Supreme Court has defined final to mean "where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed before our decision in Batson v. Kentucky." Allen v. Hardy, 478 U.S. at 258 n.1. The petitioner had not exhausted his availability of direct appeal by the time Batson was announced and therefore it was not final. Petitioner's petition for habeas corpus may be heard under the Griffith rule. See Teague v. Lane, Director, Illinois Department of Corrections, et al., supra.

Because the prosecutor's motives in using his peremptory challenges were not determined in any of the state proceedings, it is incumbent on this court to determine the motives through an evidentiary hearing, some six (6) years following the trial.[1] Therefore, the

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[1]The respondent points to Allen v. Hardy, 106 S.Ct. 278, 2881 (1986), and United States v. Allen, 666 F.Supp. 847, 853, in which the court aptly described the problem in attempting to discover the prosecutor's motives for exercising his peremptory challenges in a criminal trial that took place six (6) years ago:

> Retroactive application would require trial courts to hold hearings, often years after the conviction became final, to determine whether the defendant's proof concerning the prosecutor's exercises of challenges established a prima facie case of discrimination. Where a defendant made out a prima facie case, the court then would be required to ask the prosecutor to explain his reasons for the challenges, a task that would be impossible in

(Footnote Continued)

district court in this instance must determine whether the prosecutor's use of peremptory challenges creates a prima facie case of discrimination, Batson, 106 S.Ct. at 1723, and whether the prosecutor has articulated race-neutral reasons for the peremptory challenges. Id.

Initially, we must address whether a prima facie case of purposeful discrimination has been made by the prosecutor's use of peremptory challenges at the petitioner's trial.

(Footnote Continued)
virtually every case since the prosecutor relying on Swain would have no reason to think such an explanation would someday be necessary.

Further adding to this difficulty is the fact that the prosecuting attorney, Charles Cunningham, had conducted over 100 jury trials at the time of this case, and by the time he retired from the Philadelphia District Attorney's Office in 1986, he had conducted over 200 jury trials.

In order for petitioner to establish a prima facie case of discrimination, petitioner must show he is a member of a cognizable racial group and the prosecutor has exercised peremptory challenges to remove members of petitioner's race from the venire panel. Batson, 476 U.S. at 96, 106 S.Ct. at 1723, citing Castaneda v. Partida, 430 U.S. 482, 494, 97 S.Ct. at 1280 (1977). The facts established during the evidentiary hearing showed the petitioner to be black, and that six (6) of six (6) peremptory challenges were used by the prosecution to strike black venirepersons (Evidentiary Hearing (EH), October 5, 1988, p.5). It has been clearly established that blacks are members of a cognizable racial group. Peter v. Kiff, 407 U.S. 493, 92 S.Ct. 2163, 33 L.Ed. 2d 83 (1972).

"Second, the defendant is entitled to rely on the fact, as which

[sic] there can be no dispute, that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.'"

"Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the venireman [sic] from the petit jury on account of their race." Batson v. Kentucky, 476 U.S. at 96.

Based on the above-stated criterion, it is clear that petitioner has established a prima facie case of purposeful discrimination. The petitioner is black and all six (6) of the venirepersons the prosecutor peremptorily challenged were black (EH, 10/5/88, p.17). The record indicates that the jury consisted of eleven (11) white [sic] and one (1) dark-skinned Indian (EH, 10/5/88, pp.

41-42; see petitioner's testimony at pp.55-56).[2]

> If all of the jurors of defendant's race are excluded from the jury, we believe that there is a substantial risk that the Government excluded the jurors because of their race. Our holding helps to avert that risk by requiring the Government to explain the reasons for its challenges when no members of a defendant's race are left on the jury.

United States v. Chalen, 812 F.2d 1302, 1314 (10th Cir. 1987).

A prima facie case of discrimination having been established, the burden shifts to the prosecutor to give race-neutral reasons for having peremptorily stricken the six (6) jurors. Batson, 476 U.S. at 96, 106 S.Ct. at 1723. Normally,

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[2]In Chief Justice Burger's dissent in Batson, 476 U.S. 130, he notes the problems courts face in reconstructing the race of the jury panel: "[e]ven after a 'record' on this issue has been created, disputes will inevitably arise."

a federal habeas corpus petitioner has the burden of proving all facts entitling him to a discharge from custody. Brown v. Cuyler, 669 F.2d 155 (3d Cir. 1982), citing Goins v. Brierley, 464 F.2d 947, 949 (3d Cir. 1972). It has been recognized, however, that "with respect to certain factual issues, the burden of proof may be shifted to the state because of specific policy considerations or because the available evidence is likely to be in the hands of the state." Id. at 949. In dealing with Batson issues, once the petitioner has established a prima facie case of discrimination, the burden shifts to the prosecutor to give race-neutral reasons for having peremptorily stricken the jurors. Batson, 476 U.S. at 96, 106 S.Ct. at 1723.

In this case, the trial court did not pursue a Batson analysis (because there was no Batson analysis to pursue in

1982) and, therefore, this court is acting as the finder of fact.

For the selection of the first ten (10) jurors, Judge Hill conducted the voir dire. A twelve-person venire panel was first put into the jury box and they were questioned by Judge Hill. Following the questioning, Judge Hill asked the lawyers if they had any questions. The lawyers all declined the invitation to ask questions (Trial Tr. 279). Four (4) persons were selected for the jury from this panel. Eight (8) people were then brought into the courtroom to be questioned by Judge Hill. Following Judge Hill's questions, he once again asked the attorneys if they had any questions, and again none of the attorneys asked questions. Seven (7) of these eight (8) jurors were accepted. After the first eleven (11) jurors had been accepted, Judge Hill allowed the lawyers themselves

to conduct the voir dire. Fourteen (14) jurors were eventually chosen, two (2) as alternate jurors. Of the six (6) jurors peremptorily stricken by the prosecution, only two (2) were directly questioned by the attorneys (Rudolph Gray (Trial Tr. 322) and Alma Nottingham (Trial Tr. 337)). The defense did not use their peremptory strikes.

The facts established during the evidentiary hearing are as follows:

The prosecutor utilized six (6) of his eight (8) available peremptory challenges to exclude black persons from the petitioner's jury (the prosecutor used only six (6) peremptory challenges). The jurors stricken were (1) Richard Edwards, (2) Sammy Toney, (3) Alice Wright, (4) Stanley Logue, (5) Rudolph Gray, Sr., and (6) Alma Nottingham.

At the October 5, 1988 evidentiary hearing, the prosecuting

attorney in Commonwealth v. Harrison, former Assistant District Attorney Charles J. Cunningham testified first to his general rationale in selecting a jury and then gave his reasons for striking the particular jurors. Cunningham testified that when he picks a jury, he tries to find people who will agree with him and agree with each other so that "they could reach a unanimous verdict" (EH, 10/5/88, pp.6-7). Cunningham stated that he wants the jury he picks to be able to hand down a conviction, so he looks to whether a potential juror or a family member of the potential juror was someone "who had spent time in prison, having been convicted of a serious crime" (EH, 10/5/88, p.8). Cunningham further noted that he takes into consideration a potential juror's employment history and educational level. "A good employment history show a stable lifestyle" and "their education tells me

something about the way they think" (EH, 10/5/88, p.9). He stated that while in the District Attorney's office, he tried over two hundred (200) jury trials. At the time of the petitioner's trial, he estimated he had tried over one hundred (100) jury trials.

Cunningham testified that he did not specifically remember this case but that his memory would be refreshed by referring to four (4) pages of handwritten notes made contemporaneously with the voir dire process of the petitioner's trial (EH, 10/5/88, pp.10-11). These notes were marked into evidence. These notes were used by Cunningham to record juror responses to questions during the voir dire, and so that he could keep "a running count of peremptory challenges and whether they were excused." He also explained certain marks on the notes: "jurors that are accepted, I circled the number and their

position in the box. Jurors that are excused or stricken, ... I have a line through their name or number...." (EH, 10/5/88, p.11).

By referring to both his notes and the trial transcript, Cunningham testified as to the reasons he struck the individual jurors. For each individual juror questioned in the voir dire, Cunningham recorded notes "reflecting answers that [he] thought were important to [his] decision as far as accepting or rejecting the juror" (EH, 10/5/88, p.13).

(1) As to Richard Edwards, Cunningham wrote the words "56, 11th grade, in South Carolina, Wynnefield, 16 years, unemployed truck driver, three kids" (EH, 10/5/88, p.14). Cunningham had written an "O.K." under this juror's name meaning that Cunningham had initially decided to accept him as a juror, but subsequently decided to strike him (EH,

10/5/88, p.14). By referring to page 249 of the trial transcript, Cunningham reasoned that he subsequently struck Edwards because his oldest son had been arrested in a bank for carrying a .357 magnum. "I didn't even bother writing down in the notes the business about the gun. That tells me that as soon as I heard about the gun, I decided I didn't want him" (EH, 10/5/88, pp.15-16).

(2) As to Sammy Toney, Cunningham noted "56; South Carolina; tenth grade, North Philadelphia 28 years; laid off construction" (EH, 10/5/88, p.19). Cunningham could not remember why he struck this juror but guessed that, "It could have been as simple as he and Mr. Edwards sitting next to each other in the jury box. They're both 56 years old, they're both from South Carolina. If the two of them were getting along well, I would not keep Tammy [sic] Toney after I

had stricken Richard Edwards. Having knocked his friend off the jury, I wouldn't keep him. But I don't recalll [sic] if that was the case" (EH, 10/5/88, p.20).

(3) The third Commonwealth peremptory challenge was utilized against Alice Wright. Again, written in his notes, the word "O.K." is circled underneath this juror's name, and only after hearing responses to voir dire questions did he draw a line through her name indicating that he rejected her. These words were within his notes, "Georgia, West Philadelphia 22 years; lived alone; her son was a retired police officer" (EH, 10/5/88, p.21). Cunningham was not able to remember why he decided to strike her as a juror. "Just looking at these notes, I don't know. I don't have her age down here. The fact that her son is a retired police officer, I assume she is an older

woman. That could have been a factor; I don't know" (EH, 10/5/88, p.22). The record indicates that Alice Wright was seventy (70) years old at that time (see discussion herein).

(4) As to Stanley Logue, Cunningham recorded in his notes that this potential juror was thirty-five (35) years old, had two (2) years of liberal arts education at Temple University, and was from Southwest Philadelphia. Cunningham cited his reason for not accepting Logue as a juror: "liberal arts majors are not good prosecution jurors. They're too inquisitive; they look for doubt. That's the nature of liberal arts education.... He's a person who might go back in jury deliberations and raise issues that the lawyers have not even considered, had not presented, which is the most difficult kind of juror, because you can rebut what the other lawyer is doing. You can't

rebut what the jurors are thinking on their own and are liable to bring up in jury deliberations" (EH, 10/5/88, p.23).

(5) The fifth Commonwealth peremptory challenge was exercised against Rudolph Gray, Sr. Cunningham wrote in his notes "Roxborough; Conrail, his wife equal Sears, meaning his wife works at Sears, and interfere." Referring to the September 15, 1982 voir dire notes (p.323), Cunningham remembered he struck this potential juror because he had been arrested for interferring [sic] with a police officer. "[I] would not as a D.A. want a juror who had been arrested himself. He would more likely be critical of the police, more likely be sympathetic toward the defendant, and it's just not the type of juror that you want" (EH, 10/5/88, p.25).

(6) The sixth Commonwealth peremptory challenge was Alma Nottingham.

The District Attorney's notations reflect that she was married, lived in Southwest Philadelphia and worked in sales at Woolworths. He also wrote "daughter = cab." Cunningham was not able to reconstruct from his notes the reasons for striking her, but by referring to page 340 of the trial transcript, he was able to infer that she was stricken because she was being tentative as to whether or not she could be a good juror (EH, 10/5/88, p.27).

Upon cross-examination, Cunningham asserted his conclusion that Alma Nottingham was being tentative was based on the following exchange which took place at page 340 of the trial transcript:

> Q. Any reason why you could not be fair to both the defendants and the prosecution in this case?
>
> A. I don't think so. I could probably be fair.

Q. You seem to hesitate a little bit.

A. I hope to anyhow.

Q. You seem to hesitate a little bit. Any reason?

A. No, no reason. I'll come to a fair judgment for both of them.

DISCUSSION OF LAW

Once a prima facie case of discrimination in jury selection has been shown, a prosecutor has the burden to come forward with race-neutral reasons to explain the peremptory challenges. Batson, 476 U.S. at 96, 106 S.Ct. at 1723. The prosecutor's explanation need not rise to the level of exercise of a challenge for cause. McCray v. Abrams, 750 F.2d 1113, 1132 (2nd Cir. 1984); Booker v. Jabe, 775 F.2d 762, 773 (6th Cir. 1985). In order to rebut the defendant's prima facie case of purposeful discrimination, "[t]he prosecutor ... must articulate a neutral explanation related to the

particular case to be tried." Batson, supra at 98. "The prosecutor must give a 'clear and reasonably specific' explanation of his 'legitimate reasons' for exercising the challenges. Batson, supra at 98 n.20. The case upon which Justice Powell most relied in writing the opinion of the Court in Batson, attempted to define the standard as requiring the prosecutor to show "genuine reasons other than group affiliation" or "some slight bias that would not support a challenge for cause." McCray v. Abrams, supra at 1130. By reading Batson alone, the standard seems to be one where the prosecutor must be able to articulate explanations which are "neutral"; "clear and reasonably specific"; "legitimate", and "genuine", yet not rising to a level for challenge for cause.

However, as then Chief Justice Burger noted in his dissent of Batson,

"[a] 'clear and reasonably' specific explanation of 'legitimate reasons' for exercising the challenge will be difficult to distinguish from a challenge for cause." Id. at 127. Furthermore, Justice Marshall warned in his concurring opinion of Batson, "[w]hen a defendant can establish a prima facie case, the trial courts are forced [sic] with the difficult burden of assessing prosecutors' motives." Citing King v. County of Nassau, 581 F.Supp. 493, 501-502 (E.D. N.Y. 1984). "Any prosecutor can easily assert racially neutral reasons for striking a juror, and trial courts are ill-equipped to second-guess those reasons." Id. at 105-106.

The federal circuit courts have helped to define the standard by identifying those reasons posed by the prosecutor in striking a juror (once the prima facie case is established) and whether those reasons were "race-neutral" in light of

Batson.[3] Other than a review of these

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[3]1st Circuit - United States v. Angiulo, 847 F.2d 956 (1988) (court held peremptory challenges not racially motivated where the reasons given were one juror had provided false or misleading statements in response to the government's questionnaire; another had answered questions in a "flip" manner; another struck because of a recent move and the care of a small child would be too distracting thought the prosecutor; and a fourth juror was from a small town where a member of the defendants resided).

2nd Circuit - Roman v. Abrams, 822 F.2d 214 (1987) (court refused to believe the prosecutor proffered reason that he struck juror because the potential juror's knowledge of electronics, bookkeeping, and computers justified their exclusion because such knowledge might prevent the juror from accepting the reasonable doubt standard of proof).

4th Circuit - United States v. Garrison, 849 F.2d 103 (1988) (court held it was a racially neutral reason to strike two black women because they chatted with each other during the voir dire process and gave other indications of boredom and disdain for the process). See also United States v. Woods, 812 F.2d 1483 (1987) (court held that black juror appropriately excused because he was a Charleston resident, and the prosecutor contended the

(Footnote Continued)

cases, and the words of Batson itself, we

(Footnote Continued)
"Charleston Chronicle" was biased and unfair in its comments on the case.

5th Circuit - United States v. Forbes, 816 F.2d 1006 (1987) (the hostile posture/demeanor of one juror and fact that another panel member's children had experienced trouble with the law were permissible reasons under Batson.

7th Circuit - United States v. Mathews, 803 F.2d 325 (1986) (the court held the prosecutor gave racially neutral reasons where jurors were peremptorily challenged because one expressed reservation in adequately appraising tape recorded evidence and another was late for the voir dire and was inattentive during voir dire process evidencing a lack of commitment to the prosecutor).

8th Circuit - United States v. Cloyd, 819 F.2d 836 (1987) (prosecutor stated reason that he peremptorily struck juror because the juror was familiar with Daily Liquor Store, the place where the defendant was expected to claim he was during robbery was sufficient). See also United States v. Love, 815 F.2d 55 (1987) (court held prosecutor's reason was sufficient in striking juror that had heard of business owned by one of the witnesses).

9th Circuit - United States v. Lewis, 837 F.2d 416 (1988) (court held that

(Footnote Continued)

are given no other guidelines to determine whether D.A. Cunningham's proferred [sic] reasons rise to the level required by Batson. We also have no reason to conclude that D.A. Cunningham exercised purposeful discrimination or that his motives and creditability [sic] are suspect.

Considering solely the reasons Cunningham gave for striking the jurors in

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(Footnote Continued)
venireperson's age and lack of family may have appeared relevant to prosecutor in a case involving child abuse and could be deemed racially neutral).

10th Circuit - United States v. Chalan, 812 F.2d 1302 (1987) (general reference to juror's unsatisfactory background and unspecified dissatisfaction with answers in juror's questionnaire fail to satisfy Batson).

11th Circuit - United States v. David, 844 F.2d 769 (1988) (court held racially neutral reasons for striking black jurors where reasons were one was pregnant, another was an employee in the federal government, and one's son was on probation).

question, without comparing the stricken jurors with those eventually empanelled on the petit jury, those reasons appear race-neutral. He struck Edwards because his oldest son had been arrested in a bank. In United States v. Vaccaro, 816 F.2d 443 (9th Cir. 1987), the fact that a juror had a brother in prison for a robbery conviction was deemed to be a race-neutral reason for striking that juror. In United States v. Cartlidge, 808 F.2d 1064 (5th Cir. 1987), the court held it was a race-neutral reason for the prosecutor to peremptorily challenge a juror whose brother had been convicted of robbery. Furthermore, this court finds the fact that Cunningham had initially signalled this juror as "OK" (meaning he would accept him), and struck the juror only after hearing about the man's son's conviction, is a strong inference that

Cunningham was not striking the juror because of his race.

Cunningham stated that he struck Toney because he had stricken Edwards, who had a lot in common with Toney, and the two men might have struck up a friendship. See United States v. Garrison, 849 F.2d 103 (4th Cir. 1988), (wherein [sic] a similar situation, the prosecutor's reasons for striking two seemingly friendly jurors, was [sic] deemed non-racial). The essence of Cunningham's reason was that he didn't want Toney to hold a grudge against him for having stricken his friend. Cunningham had testified at the evidentiary hearing that he wanted as jurors "people who responded well to me as opposed to responding well to defense counsel and poorly toward me" (EH, 10/5/88, p.7). Considering the above reasons, and the nature of peremptory

challenge [sic],[4] this court finds the reason for striking Toney racially neutral.

As to Wright, Cunningham was unable to remember why he struck her, but surmised it may have been because she was too old (EH, 10/5/88, p.22). In United States v. Cartlidge, supra, the fact that one stricken juror was young, single, and unemployed, was deemed to be racially neutral. Wright was a juror that Cunningham had initially thought to be acceptable ("O.K." was written in his notes) and through the passing of six (6) years is no longer able to remember why he

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[4]What is the nature of the peremptory challenge? "[A] prosecutor ordinarily is entitled to exercise permitted peremptory challenges 'for any reason at all', as long as that reason is related to his view concerning the outcome of the case to be tried...." United States v. Braun, 817 F.2d 674 (10th Cir. 1987), citing Batson, 106 S.Ct. at 1718-1719.

eventually chose to strike her. Just as in Edwards' case, the initials "O.K." written in the prosecutor's notes dissipates the inference that the prosecutor struck this juror solely because of race. Batson requires the prosecutor to articulate a race-neutral reason, and the prosecutor has done this by citing the fact that Wright was "old" (EH, 10/5/88, p.22). The record indicates she was seventy (70) years old. However, see final review of notes herein.

Cunningham stated Logue was stricken because his liberal arts education background was likekly [sic] to arouse an inquisitiveness that a prosecutor would not like to have in a juror. Cunningham thought Logue might "go back in jury deliberations and raise issues that the lawyers have not even considered." This appears to be a race-neutral reason.

Cunningham struck Gray because he had previously been arrested for interfering with a police officer. As in the case concerning stricken juror Edwards, it has been recognized by the courts that peremptorily striking a juror because the juror or a member of the juror's family has been convicted of a crime is a racially neutral reason. See United States v. Vaccaro, supra; United States v. Cartlidge, supra. Therefore, the prosecutor satisfied his burden of posing racially neutral reasons for striking juror Gray.

Cunningham asserted that his reason for striking Nottingham was that he sensed she was being tentative in response to voir dire questions which probed whether she was able to be a "fair juror (EH, 10/5/88, p.27). In United States v. Cartlidge, supra, the Fifth Circuit determined that a proper race-neutral

reason for striking a juror was that she "avoided eye contact" when being questioned. It has also been deemed an appropriately race-neutral reason to strike a juror because she was nervous about whether or not she could make the right decision. United States v. Hawkins, 781 F.2d 1483 (11th Cir. 1986). Furthermore, the Ninth Circuit in United States v. Vaccaro, supra, recognized an appropriate race-neutral reason to be that the juror exhibited a poor attitude in answering voir dire questions. Therefore, this court finds that the prosecutor's feeling that Nottingham was unsure as to whether she could be a fair juror is a race-neutral reason for striking her.

Yet, our analysis must go deeper than simply examining the reasons Cunningham proferred for striking the six (6) black venirepersons. All relevant circumstances must be considered, such as

the prosecutor's questions and statements during voir dire, United States v. Clemons, 843 F.2d 741 (3d Cir. 1987); the prosecutor's use of the voir dire process to determine whether his concerns with the venirepersons were real, United States v. Brown, 817 F.2d 674 (10th Cir. 1987); and whether the characteristics which prompted the peremptory strikes are similar to those characteristics of the empanelled jurors. United States v. Wilson, 853 F.2d 606, 610 (8th Cir. 1988). If this court finds that even one (1) juror was stricken, in violation of Batson [sic],[5] then

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[5] Batson, Marshall concurring at 476 U.S. 105-106:

> "[W]hen a defendant can establish a prima facie case, trial courts face the difficult burden of assessing prosecutor's [sic] motives. See King v. County of Nassau, 581 F.Supp. 493, 501-502 (E.D. N.Y. 1984).
> (Footnote Continued)

the motion for habeas corpus must be granted. United States v. David, 803 F.2d 1567, 1569 (11th Cir. 1986).

The petitioner urges in his brief that the prosecutor failed to

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(Footnote Continued)
Any prosecutor can easily assert racially neutral reasons for striking a juror, and trial courts are ill-equipped to second-guess those reasons. How is the court to treat a prosecutor's statement that he struck a juror because the juror had a son about the same age as defendant, see People v. Hall, 35 Cal.2d 161, 672 F.2d 854 (1983), or seemed 'uncommunicative', King, supra at 498 or 'never cracked a smile' and, therefore, 'did not possess the sensitivities necessary to realistically look at the issues and decide the facts in this case,' Hall, supra at 165, 672 F.2d at 856. If such easily generated explanations are sufficient to discharge the prosecutor's obligation to justify his strikes on nonracial grounds, then the protection erected by the court today may be illusory."

explore his concerns with the challenged jurors on voir dire. Furthermore, petitioner asserts the white jurors accepted were similar in those characteristics which led to the striking of the black jurors. No explanation is given by petitioner as to why the two (2) defense counsel did not strike the objectionable white jurors because of purportedly objectionable characteristics or in the exercise of their peremptory challenges.

For instance, the prosecutor struck Edwards because his oldest son had been arrested for carrying a gun inside a bank. However, three (3) of the white jurors accepted had a family member who was convicted of a crime (Monica Bishop - husband on probation for assault [Trial Tr. 290-292]; Patricia Cantz - brother arrested for selling marijuana [Trial Tr. 315-316]; and William Lloyd - son arrested for drunk driving [Trial Tr. 295]). When

asked in cross-examination (at the evidentiary hearing) as to why he did not strike any of these white jurors, Cunningham stated that, "minor drug offenses, traffic violations ... and assaults, provided they're not serious assaults, fall into the category of minor offenses" (EH, 10/5/88, p.50). The petitioner goes on to argue that Cunningham did not adequately explore in voir dire the details of the three (3) white jurors' relatives' experience with police and the courts, in order to conclude that the offenses were minor. The respondent further argues that Edwards' son's conviction was "minor" also in that Edwards answered in voir dire that his son was merely fined as a result of the incident. Accepting both of the respondent's arguments as true, this court finds that the similarities between the crimes of Edwards' son and the alleged crime of

the petitioner were enough to infer that Edwards was stricken for a non-racially motivated reason. Edwards' son was convicted of possessing a .357 magnum in a bank. The petitioner was being tried for a bank robbery involving the threat of a gun. Furthermore, Cunningham stated that he belived Edwards was not being entirely truthful concerning the details of his son's crime and conviction: "I had the impression that Mr. Edwards either didn't know the whole story or wasn't telling us the whole story. That he was trying to minimize what had happened to his son" (EH, 10/5/88, p.40).

The reason for striking Edwards given by Cunningham was racially neutral. "In order to have a neutral explanation, the characteristics of the struck individual cannot be present in those white panel members not struck by the government." United States v. Wilson, supra at 610.

None of the three (3) white panel members' relatives were arrested for or convicted of a crime in any way similar to the crime for which the petitioner was being tried, but the conviction of Edwards' son was very similar and, therefore, the strike was acceptable.

The respondent almost concedes that the prosecutor's strike of Gray was racially neutral. Gray was stricken, Cunningham testified, because he himself had been arrested for interfering with a police officer. The respondent is not able to point to any of the white jurors eventually accepted who, themselves, were convicted of a crime, much less arrested for inteferring [sic] with police. Therefore, the striking of Gray was also racially neutral.

Logue was struck because he had been a liberal arts major at Temple University. The respondent argues that

this would be a racially neutral reason except for the fact that Logue actually attended only two (2) years of college and failed to go on to use his liberal arts education by taking a job as a medical authorizer for the Social Security Administration (Trial Tr. 301). Additionally, the respondent argues that three (3) of the white jurors had a greater education than Logue, and although no evidence of it exists in the record, argues that each of the three (3) must have had more liberal arts type training than Logue (Rachel E. Livezey was a teacher; Thomas Thakadipparumpil had obtained a college degree in mathematics in India; and Randall E. Slimak was a third year medical student). Accepting as true the petitioner's argument that these three (3) accepted jurors had as much or more of a "liberal arts" type training than Logue, then, on this basis, Cunninghams' [sic]

rationale may have been faulty. However, Logue is the only venireperson of the four (4) mentioned above who described his educational background as one of "liberal arts". Even though Cunningham's reasoning may have been faulty, such a fault does not destroy his credibility to the point that we could say his reason for striking Logue was racially motivated.

Furthermore, there were reasons for Cunningham to not strike Slimak, despite the extensiveness of his education. In response to whether he had a friend or relative in law enforcement or the court system, Slimak responded: "Well, I have two friends, very close friends. One works for the D.A.'s Office, a lawyer, and another friend, an acquaintance, is a police officer" (Trial Tr. 309). Certainly a prosecutor would want this juror and one wonders why defense did not strike him. The selection of Thakadipparumpil

was also consistent with Cunningham's philosophy in picking a juror when education is a factor: "their education tells me something about the way they think. Do they think in concrete terms, or are they inquisitive? They're things that you can infer from their education" (EH, 10/5/88, pp.8-9). It is more difficult to reason why Cunningham selected Livezey and not Logue. Nevertheless, there does [sic] exist differences between the two. Although Livezey stated she was a graduate of Wesleyan College with a degree in education, she never said she studied "liberal arts." However, this argument takes on less significance when the fact is presented that neither Cunningham nor any other lawyer asked questions during voir dire following the trial judge's questioning, and apparently the white jurors were acceptable to all counsel. It

is only at this time as a matter of proof under Batson do they become suspect.

The Third Circuit has pointed out in United States v. Clemons, supra at 749, that the Batson Court "[c]ondemned the practice of abusing peremptory challenges to further discriminatory ends, [yet] it reaffirmed the importance of peremptory challenges as a trial procedure, and declined an invitation to abolish the process." Citing Batson, supra at 1724 and n.22. To say that the striking of Logue was discrminatory [sic] because Livezey was accepted would be moving towards the abolition of the peremptory challenge. There is no evidence on either side to indicate why one or the other was more or less acceptable.

Cunningham utilized a peremptory strike against Nottingham because she seemed to be "tentative" about whether she could be a good juror (EH, 10/5/88, p.27).

The petitioner contends that two (2) other white venirepersons, accepted onto the jury, were similarly tentative. The relevant portions of the voir dire transcript are set out below.

> A) Alma Nottingham (Trial Tr. 340)
>
> Q. Any reason why you could not be fair to both the defendants and the prosecution in this case?
>
> A. I don't think so. I could probably be fair.
>
> Q. You seem to hesitate a little bit.
>
> A. No, no reason. I'll come to a fair judgment for both of them.
>
> Q. The Judge is going to instruct you that the defendants are considered innocent until proven guilty. Would you be able to follow those instructions?
>
> A. I'm pretty sure I will be.
>
> Q. You're pretty sure?

A. Yes.[6]

B) Monica Bishop (Trial Tr. 292-293)

Q. Do you feel any hostility or annoyance at the District Attorney's Office, the police, any of the authorities for this incident that resulted in your husband being convicted and put on probation for this?

A. No.

Q. You don't?

A. No.

Q. What's that?

A. I don't think so.

Q. If you're selected to sit on this jury, will you listen carefully to the evidence?

A. Yes.

Q. Will you do your very best to be fair to each of the two defendants in this case?

A. Yes.

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[6]This questioning was conducted by Brian R. Williams, Esquire, counsel for the defendant Donald Harrison.

Q. Will you do your very best to be fair to the Commonwealth of Pennsylvania represented by the district attorney over here?

A. Yes.[7]

C) Margaret Matkowski (Trial Tr. 299)

Q. If you're selected to sit on this jury, will you listen carefully to the evidence?

A. Yes.

Q. Will you decide the case only on the evidence and not on any sympathy, favoritism or prejudice?

A. (No response).

Q. You have to say yes or no because he has to write it down.

A. Yes.

Q. If you are selected, will you do your very best to be fair to each of the two defendants?

A. Yes.

Q. And to the Commonwealth?

---

[7]The trial judge, the Honorable Louis G. Hill, conducted this questioning.

A. Yes.[8]

Attempting to reconstruct a juror's tone of voice, inflection, demeanor, attitude, or truthfulness through the use of a transcript is impossible. However, even by viewing the transcript alone, it is reasonable to suspect that Nottingham may have been "tentative". By viewing the transcript it seems that Nottingham's demeanor was such to prompt further questioning from defense counsel because she seemed hesitant.

D.A. Cunningham stated that he could not remember clearly why he peremptorily challenged Toney or Wright. Cunningham had been able to recall why he struck the other four (4) jurors.

It has been very difficult to determine whether or not the striking of

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[8] Id.

Toney was racially motivated. As stated earlier in this opinion, the reason given by Cunningham for striking Toney was racially neutral on its face. It was based solely on his intuition that Toney, who was sitting next to the stricken juror Edwards, was becoming friendly with Edwards because they were the same age and both from North Carolina. Cunningham reasoned that Toney could hold a grudge against the prosecutor for having stricken his friend, Edwards. The petitioner argues that this explanation is illogical because Toney had no way of knowing which attorney excused Edwards, being the peremptorily [sic] challenges were made anonymously. The Supreme Court has enunciated in Batson that once a prima facie case of discrimination is established, it is the prosecution's burden to come forward with a neutral explanation for challenging the black

jurors (476 U.S. at 97). "The prosecutor therefore must articulate a neutral explanation related to the particular case to be tried." Batson, 476 U.S. at 98. The explanation given by the prosecutor must be clear, reasonably specific and legitimate. Batson, 476 U.S. at 98, n.20, citing Texas Department of Community Affairs v. Burdine, 450 U.S. at 258.

Even in United States v. Garrison, supra (see footnote 3), other facts existed other than that the two woman [sic] jurors seemed friendly. They also seemed bored, chatted with one another during voir dire, and showed general disdain for the entire process.

As mentioned earlier in this opinion, it is understood how difficult it must be for Cunningham to remember why he peremptorily struck a juror six (6) years before. It is not at all clear that Cunningham had a discriminatory motive in

striking Toney. However, Cunningham explained his reason. It was clear and reasonably specific and, except for the fact that the juror was black, legitimate. The petitioner presented no evidence as to this juror, no witnesses, no attorneys, nothing except reasonable argument which requires us to go beyond what is before us and find purposeful discrimination merely on petitioner's argument. While I am not overwhelmed with the prosecutor's logic, there was little contradictory evidence to question the difficult standard that Batson requires.

Under the Batson standard, the peremptory challenge of Wright is more complicated as an evidentiary matter. Cunningham suggested that he might have stricken Wright because she was too old. She had testified in voir dire that she was seventy (70) years old. The entirety of Cunningham's direct testimony

concerning the striking of Alice Wright in the evidentiary hearing is as follows:

Q. All right.

I'd like to next direct your attention to juror number 698, Alice Wright.

Yes. That was the third --

THE COURT: The last name?

MS. CHAMBERS: Wright, W-R-I-G-H-T.

THE WITNESS: That was the third Commonwealth peremptory challenge. Although, again, with Alice Wright, I had written down O.K., then her answers, the ones that I had recorded were that she was from Georgia, West Philadelphia 22 years; lived alone; her son was a retired police officer.

Q. Now, the notation O.K. would mean what to you at this time?

A. That means that she was okay. I was going to take her as a juror, that I was going to accept her.

Q. All right. But you did not, obviously.

A. Right.

Q. And what if you can, tell us what would be the reason that you would strike her?

A. I don't know.

Q. You don't have a present recollection, is that correct?

A. That's right.

Q. I guess my question would be: Given this kind of a history that you noted for her and your initial impression that you would accept her given your practice in voir dire, what kind of reason would you have to strike someone, to strike a juror?

MS. KOLLER: Objection. It calls for speculation as to why he didn't know why he struck this juror.

MS. CHAMBERS: If I may, we're trying to reconstruct a trial.

THE COURT: I'll hear the answer.

THE WITNESS: Just looking at these notes, I don't know. I don't have her age down here. The fact that her son is a retired police officer, I assume she is an older woman. That could have been a factor; I don't know.

The difficulty with this peremptory strike is his several answers that he did not know why he struck her and he did not have a present recollection. Certainly under those circumstances the evidence fails to satisfy the evidentiary standard of Batson requiring a "clear", "reasonably

specific", "legitimate" and "neutral explanation".

It is true that he had marked this juror "OK" but then struck her. If it was his opinion that she was too old, there is nothing in the evidence to contraduct [sic] that. That was his judgment. Merely being seventy (70) years old does not contradict that. Petitioner argues that three (3) white jurors were in their sixties. The fact that three (3) white jurors were in their sixties does not mean that they were too old. Obviously a numerical age has its significance in some instances, but merely a numerical age does not lead to a conclusion that a person is too old to serve on a jury regardless of their race. Anyone [sic] of the jurors could have been too old in the mind of the prosecutor for many reasons other than a numerical age. Certainly the mother of a retired police

officer would be the type of juror who a prosecutor could easily expect to support his point of view, whether she was black or white.

The reason why I must reject this explanation is not because of age but because the prosecutor could not recall his reason. The testimony which I credit is summarized by his repeated statement "I don't know." Since this is not a satisfactory explanation under Batson, I conclude the evidence is not acceptable and the Commonwealth has failed to meet the standard.

I do not believe that D.A. Cunningham utilized his peremptory challenges in a discriminatory manner, but only that he failed to satisfy the Batson test. It is also clear from a review of the trial record that the evidence at trial against petitioner was overwhelming and that he was not prejudiced by the

peremptory challenges. A jury, whether black or white, could easily have found him guilty of the charges.

In this case, following the rule of Batson and its consequences, we must order a new trial. A new trial is necessary eventhough [sic] the evidence against the petitioner is clear and his guilt admitted by his own statement introduced at trial. It would have been unusual for any juror to ignore the evidence of guilt. It is at this point Justice Stevens suggests a different standard in Teague v. Lane, Director, Illinois Department of Corrections, et al., supra, which I quote:

> "When a criminal defendant claims that a procedural error tainted his conviction, an appellate court often decides whether error occurred before deciding whether that error requires reversal or should be classified as harmless. I would follow a parallel approach in cases raising novel questions of constitutional law on collateral review, first determining whether the trial process violated any of the petitioner's constitutional rights and then

> deciding whether the petitioner is entitled to relief. If error occurred, factors relating to retroactivity -- most importantly, the magnitude of unfairness -- should be examined before granting the petitioner relief. Proceeding in reverse, a plurality of the Court today declares that a new rule should not apply retroactively without ever deciding whether there is such a rule.

Id. at 2, Slip Opinion, Justice Stevens concurring in part and concurring in judgment.

RECOMMENDATION

I recommend that the Writ of Habeas Corpus requested under 28 U.S.C. § 2254 be GRANTED and that petitioner be retried within ninety (90) days from the court's final order or be released.

TULLIO GENE LEOMPORRA
CHIEF UNITED STATES MAGISTRATE